

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WAYNE LAWSON,

Petitioner,

No. CIV S-04-1869 GEB DAD P

vs.

JEANNE WOODFORD, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus. Petitioner challenges a decision of the state parole board in 2002. Respondents have moved to dismiss the petition on the ground that it is barred by procedural default. Petitioner filed timely opposition to the motion. Respondents did not file a reply.

PROCEDURAL HISTORY

Petitioner is confined pursuant to a judgment of conviction entered in the Sacramento County Superior Court in 1990. A jury found petitioner guilty of one count of second degree murder in violation of Penal Code § 187, and it was determined that petitioner used a firearm in the commission of the crime. On March 16, 1990, petitioner was sentenced to a state prison term of seventeen years to life with the possibility of parole. (Pet. at (2); Mot. to Dismiss at 3 & Ex. 1.)

1 Petitioner's initial parole consideration hearing, held at Folsom State Prison on
2 June 28, 1999, resulted in a three-year denial of parole. (Mot. to Dismiss, Ex. 2 at 20.)
3 Petitioner's first subsequent parole consideration was held at Folsom State Prison on June 12,
4 2002. (Id. at 3 & Ex. 2 at 1 & 20.) On that date, a two-member panel of the Board of Prison
5 Terms found petitioner not suitable for parole and denied parole for two years. (Id. at 3 & Ex. 2
6 at 37 & 40.) The decision rendered on June 12, 2002, is at issue in this case.

7 Petitioner filed an administrative appeal from the June 12, 2002 decision on
8 September 2, 2002, and prison officials forwarded the appeal to the Board of Prison Terms
9 Office of Policy and Appeals on September 24, 2002. (Mot. to Dismiss at 4 & Ex. 3; Pet., Ex. 1,
10 Administrative Appeal.) The record does not reflect whether the Office of Policy and Appeals
11 issued a decision on petitioner's appeal or provided any other response to the appeal at any time.

12 After petitioner received no response to his appeal within 120 days, he sought
13 relief in the state courts. A habeas petition dated January 24, 2003, was sent to the Sacramento
14 County Superior Court together with a motion to waive exhaustion of administrative remedies.
15 (Mot. to Dismiss at 4; Pet., Ex. 1, Superior Court Habeas at 3A & 5.) In an order filed March 25,
16 2003, the Superior Court denied the petition for failure to exhaust administrative remedies.
17 (Mot. to Dismiss at 4 & Ex. 4 at 1-2.) The court denied the petition with leave to resubmit it
18 after exhausting administrative remedies or, in the alternative, to resubmit it with a showing that,
19 in his individual case, exhaustion of administrative remedies would be futile. (Id., Ex. 4 at 2.)

20 Petitioner submitted a habeas petition to the California Court of Appeal for the
21 Third Appellate District.¹ (Pet., Ex. 1, Appellate Court Habeas Corpus.) The appellate court's
22 order filed May 15, 2003, reads as follows: "The petition for writ of habeas is denied on the
23 merits." (Mot. to Dismiss at 4 & Ex. 5.) Petitioner submitted a habeas petition dated July 9,
24

25 ¹ The copy of the petition provided by petitioner does not include the final page of the form
26 petition or any other indication of the date on which the petition was signed or mailed to the
appellate court.

1 2003, to the California Supreme Court. (Pet., Ex. 1, State Supreme Court Habeas Corpus.) The
2 petition was summarily denied by order filed May 19, 2004. (Mot. to Dismiss at 4 & Ex. 6.)

3 Petitioner's federal habeas petition was received for filing on September 8, 2004.

4 RESPONDENTS' CONTENTIONS

5 Respondents assert that the federal court is prohibited from addressing petitioner's
6 habeas claims because petitioner did not exhaust the administrative appeal process before
7 seeking judicial review of the Board's decision and "the state court" rejected his petitions on the
8 independent and adequate state ground of failure to exhaust administrative remedies. (Mot. to
9 Dismiss at 3.)

10 Respondents argue that the doctrine of independent and adequate state grounds
11 precludes federal courts from addressing the habeas corpus claims of state prisoners when a state
12 law default prevented the state court from reaching the merits of the claims. Respondents assert
13 that the procedural default rule applies where a state procedural rule provides an adequate and
14 independent state law basis on which the state court may deny relief. Applying these principles
15 to the present case, respondents assert that the state superior court declined to consider the merits
16 of petitioner's claims on the independent state ground of failure to exhaust administrative
17 remedies and the appellate and supreme courts implicitly adopted the superior court's decision.
18 Respondents conclude that the state courts' denial of the petitions based on an independent state
19 ground bars federal review and requires dismissal of the federal habeas petition.

20 PETITIONER'S ARGUMENTS

21 Petitioner states that he mistakenly believed that the Board of Prison Terms was
22 required to respond to his administrative appeal within 120 days, when in fact there was no time
23 limit for a response. Petitioner notes that he was aware of the exhaustion requirement and moved
24 for relief from it on the ground of prejudice arising from unreasonable delay. Petitioner notes
25 that the petition he filed in the appellate court was denied on the merits, and the petition he filed
26 in the California Supreme Court was denied without explanation.

1 Petitioner points out that one of the cases cited by respondents demonstrates that
2 the Board of Prison Terms and the agency that preceded it had answered appeals in an untimely
3 manner for 30 years. Petitioner states that in 2003 the state adopted a reasonable time limit of
4 120 days for responding to an appeal and agreed that after 120 days a petitioner could proceed to
5 court if no response had been received. Petitioner asserts that the administrative appeal process
6 was eliminated entirely on May 1, 2004, by Administrative Directive 01-04.

7 Petitioner contends that the administrative appeal process was inadequate and that
8 exhaustion was not required after the agency was given a fair opportunity to respond to his
9 appeal. Citing the fact that his second subsequent parole consideration hearing was six months
10 overdue when he prepared his opposition to respondents' motion, petitioner emphasizes the
11 prejudice suffered by state prisoners in the past due to the Board's failure to respond to
12 administrative appeals in a timely manner.

13 ANALYSIS

14 The state regulations governing administrative appeals were repealed in 2004.
15 Cal. Code Regs. tit. 15, § 2050 (West 2005). The repealer was filed on April 15, 2004, and was
16 operative on May 1, 2004. Id. The unavailability of administrative appeals for most parole
17 decisions has been cited in a parolee class action proceeding in this district and in a suit brought
18 in the Central District by an attorney challenging the removal of his name from a list maintained
19 by the Board of Prison Terms for use in appointing attorneys to represent parolees in parole
20 revocation proceedings. See Valdivia v. Schwarzenegger, case No. CIV S-94-0671 LKK GGH
21 (E.D. Cal.) (Stipulation and Order Regarding Final Notice to Plaintiff Class); Jacobson v.
22 Schwarzenegger, 357 F. Supp. 2d 1198, 1208 (C.D. Cal. 2004) ("The BPT has repealed its
23 regulations governing administrative appeals.").

24 It appears that there was no administrative appeal process available after May 1,
25 2004. Respondents have offered no evidence that the Board continued to process or decide
26 appeals after that date or that the petitioner in this case ever received a decision on the appeal he

1 filed on September 2, 2002. In the absence of evidence and argument in this regard, the court is
2 not persuaded that the California Supreme Court denied petitioner's state habeas petition on May
3 19, 2004, for failure to exhaust administrative remedies that were no longer available.

4 Nor is the court persuaded by respondents' argument that both of the higher state
5 courts implicitly adopted the superior court's application of a procedural bar for failure to
6 exhaust administrative remedies. "[T]he California Constitution provides that each of the three
7 levels of state courts—Superior Courts, Courts of Appeal, and the Supreme Court—has 'original
8 jurisdiction in habeas corpus proceedings.'" Gaston v. Palmer, 387 F.3d 1004, 1010 (9th Cir.
9 2004 (quoting Cal. Const. art. VI, § 10)). A California prisoner may file an original habeas
10 petition in each of the three courts, and each court may exercise its original jurisdiction. When
11 the state's higher courts issue postcard denials, i.e., decisions without comment or citation, the
12 Ninth Circuit Court of Appeals construes those denials as decisions on the merits. Gaston, 387
13 F.3d at 1013 (citing Hunter v. Aispuro, 982 F.2d 344, 348 (9th Cir. 1992)). See In re Clark, 5
14 Cal 4th 750, 769 n.9 (1993) (noting that "summary denial" of a state habeas petition "does not
15 mean that the court has not considered the merits of the claims").

16 In the present case, the California Court of Appeal expressly denied petitioner's
17 state habeas petition on the merits, and the California Supreme Court's order denying petitioner's
18 state habeas petition without comment or citation must be construed as a decision on the merits.
19 The effect of these two decisions is to remove the procedural default that caused the Sacramento
20 County Superior Court to reject petitioner's initial state habeas petition. Ylst v. Nunnemaker,
21 501 U.S. 797, 801 (1991) ("State procedural bars . . . may expire because of later actions by state
22 courts. If the last state court to be presented with a particular federal claim reaches the merits, it
23 removes any bar to federal-court review that might otherwise have been available.").

24 Respondents have not demonstrated that the state courts denied relief on an
25 independent state ground that bars federal review and requires dismissal of the federal habeas
26 petition.

Accordingly, IT IS HEREBY RECOMMENDED that:

1. Respondents' November 5, 2004 motion to dismiss be denied; and

2. Respondents be granted thirty days to file an answer to the habeas petition filed September 8, 2004.

These findings and recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten court days after being served with these findings and recommendations, any party may file and serve written objections with the court. A document containing objections should be titled "Objections to Magistrate Judge's Findings and Recommendations." Any reply to objections shall be filed and served within ten court days after service of the objections. The parties are advised that failure to file objections within the specified time may, under certain circumstances, waive the right to appeal the District Court's order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: June 21, 2005.



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

DAD:13
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